Financialisation of the transnational food chain: from threat to leverage point?

Dr. Tomaso Ferrando, Bristol University Law School

Abstract

The 2008-2009 spike in food prices brought to the forefront the link between the transnational food system and the mechanisms of finance. However, the connections between the food system and financial capital go far beyond trading in futures and food-related indexes: financial capital is increasingly affecting access and ownership of land, supporting monoculture and long-distance trade, supporting the production of animal proteins and redefining the way in which transformation, distribution, and consumption take place. In response to this process, two categories of approaches are identified that differ in terms of objective and processes: that of those who prefer engaging from within the financial paradigm and that of those who call for more stringent regulations. This contribution uses a series of examples to reflect on the potential and limits demonstrated by different legal and quasi-legal to the financialisation of the food system and suggest that complexity and interconnections may become allies in making the food system more sustainable. Among these, the potential behind the EU Directive 95/2015 on non-financial disclosure is analysed with particular care.

Introduction

The 2008-2009 commodity bubble, the food shortages and the riots that ensued in several countries around the world brought to the forefront the link between the transnational food system and the mechanisms of finance: the impact that speculation can have on the availability of food became visible.[1] However, the connection between the food system and financial capital is deeper than trading in futures and food-related indexes: global finance has stretched to the roots and fundamentals of the food chain and is penetrating its daily practices. In the last decade, news from the financial world and academic studies suggest that private

[1] Jennifer Clapp, 'Financialization, Distance and Global Food Politics' (2014) 41(5) *Journal of Peasant Studies* 797; SOMO, *Building a coalition against food speculation*, (2011), online: <https://www.somo.nl/building-a-coalition-against-food-speculation>; Oliver De Schutter, 'Observations on the current food price situation', Background note, (January, 2011); Oliver De Schutter, 'Food Commodities Speculation and Food Price Crises: Regulation to reduce the risks of price volatility', United Nations, Briefing Note 02, 2011; Luigi Russi, *Hungry Capital: The Financialization of Food* (Zero Book, 2011); Steve Wiggins and Sharada Keats, *Grain Stocking and Price Spikes* (Overseas Development Institute, 2011); David Burch and Geoffrey Lawrence, "Towards a Third Food Regime: Behind the Transformation" (2009) 26(4) *Agricultural and Human Values* 267.

equity funds, pension funds, insurance groups and commercial banks have targeted the agri-food system as a safe harbour in which to allocate their shareholders' money and extract high returns.[2] Through equity, debt or other legal tools, financiers have been increasing their role in defining what is produced, eaten, distributed and consumed. The consequences of such a massive flow of money that is invested in the food system in order to reward pensioners, billionaires and rent-seekers shareholders (in the order of tens of billions of dollars per year) cannot be ignored.

The fact that the food system has been financialised should not come as a surprise. Rather than an exception, the link between Wall Street and food is the manifestation of a process of transformation and expansion of capitalism that has been discussed by several authors adopting different perspectives and looking at other sectors of the economy.[3] Although not unexpected, the redefinition of the agri-food system to satisfy the aspirations and objectives of financial actors raises specific questions and poses ad hoc challenges. In a world were almost two billion people are food insecure (not having access to enough adequate food or eating too much and of poor quality),[4] a third of the food for human consumption is thrown away,[5] 36 percent of global crops are fed to livestock,[6] food systems in 2012 contributed 19–29 percent of global anthropogenic greenhouse gas (GHG) emissions,[7] and financial investors hold around 80 percent of all the shares available on stock markets, [8] we must take the presence and actions of finance seriously.

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[2] See, e.g., BlackRock, *BlackRock World Agricultural Fund*' (2018), online:< https://www.blackrock.com/hk/en/products/229904/blackrock-world-agriculture-fund-a2-usd>; Ecofin Agency, 'Phatisa Food Fund 2 first closes at us$ 121.5 million' (*Ecofin Agency*, 3 October 2018), online: < https://www.ecofinagency.com/finance/0310-39030-phatisa-food-fund-2-first-closes-at-us-121-5-million>
and Tatiana Freitas , 'Harvard Blew $1 Billion in Bet on Tomatoes, Sugar, and Eucalyptus' (Bloomberg, *1 March* 2018), online: < https://www.bloomberg.com/news/articles/2018-03-01/harvard-blew-1-billion-in-bet-on-tomatoes-sugar-and-eucalyptus>. Among the academic publications that have reflected on the link beterrn food and finance, see, e.g. Jennifer Clapp and Ryan Isakson. *Speculative Harvest. Financialization, Food and Agriculture* (Fernwood Publishing, 2018); Jennifer Clapp and Ryan Isakson, 'Risky Returns: The Implications of Financialization in the Food System' (2018) 49(2) *Development and Change* 437.

[3] Gerald Epstein, *Financialization and the World Economy* (Edward Elgar, 2005); Ben Fine, 'Financialization from a Marxist perspective' (2014) 42(4) *International Journal of Political Economy* 47; Philip Arestis, Aurélie Charles and Giuseppe Fontana. 'Financialization, the Great Recession and the stratification of the US labor market' (2013) 19(3) *Feminist Economics*, 152-180.

[4] Food and Agriculture Organization, *The State of Food Security and Nutrition* (Food and Agriculture Organization, 2018).

[5] Nicola Lucifero, 'Food Loss and Waste in the EU Law between Sustainability of Well-Being and the Implications on Food System and on Environment' (2016) 8 *Agriculture and Agricultural Science Procedia* 282; Tomaso Ferrando and Julie Mansuy, 'European Action Against Food Loss and Waste: Co-Regulation and Collisions on the Way to the Sustainable Development Goals' (2018) 15 *Yearbook of European Law* 1;

[6] Emily S. Cassidy, Paul C. West, James S. Gerber and Jonathan A. Foley, 'Redefining agricultural yields: from tonnes to people nourished per hectare' (2013) *Environmental Research Letters* 1.

[7] Sonja J. Vermeulen, Bruce M. Campbell and John S.I. Ingram, 'Climate Change and Food Systems' (2012) 37 Annual Review of Environment and Resources, 195

[8] Charles McGrath, 80% of equity market cap held by institutions (Pensions & Investments, 25 April 2017), online: <https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions>

Decisions made by few key financial players are increasingly transforming land into a financial asset and making it hard for small-scale farmers to stay on the land, supporting the expansion of large scale conventional monoculture, relying on the consolidation of long distance trading, providing liquidity to livestock producers to satisfy the protein demand of emerging countries and 'covering with gold' companies that patent and sell genetically modified seeds because of the desire for higher yields.[9] In one sentence, finance is actively engaged in globalising a transnational food chain that produces high economic return independently from people's needs and the ecological limits of the planet.

This transition has not gone unnoticed and different approaches have been adopted both within and without social movements. Yet, reactions and engagement may be limited by the complexity of the matter, the lack of clarity and the intensification of the imbalance of power between those who profit from the system and those who suffer from its externalities.[10] On the one hand, there is the conflictual position, that the increasing financialisation of the food chain and the distance between decision making and conducts produce a multiplicity of negative effects and hinder resistance.[11] Even when institutional investors and large financial players are involved, responsible forms of ownership and good governance would not be transformative,[12] because of the obsession with shareholders' value and because of the way in which growth has to be constantly achieved. Geographically separated from the low paid producer workforce, the starving populations and the unbreathable air contaminated by pesticides, financial investors are only looking at quarterly performances, so that financial report and profitability become the sole possible language of communication between principals and agents.[13]

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[9] Madeleine Fairbarn, ''Like Gold with Yield': Evolving Intersections between Farmland and Finance' (2014) 5(41) *Journal of Peasant Studies* 777.

[10] Jennifer Clapp and Ryan Isakson (n 2).

[11] Jennifer Clapp (n 1) 797; Anna Chadwick. *Law and the Political Economy of Hunger* (Oxford University Press, 2019); Russi (n 1). On distancing and the food system, see, e.g. Harriet Friedmann, 'Distance and Durability: the Shaky Foundation of the World Food System' (1992) 13(2) *The World Quarterly* 371. On distancing and the limits of enforcing responsibility in the global economy, see, e.g., Thomas Princen, 'The shading and distancing of commerce: When internalization is not enough' (1997) 20(3) *Ecological Economics* 235. On resistance against financialization, see, e.g., Andrea M. Collins, 'Financialization, Resistance and the Question of Women's Land Rights' (2018) *International Feminist Journal of Politics 1*; Per Forsberg, Anna-Karin Stockenstrand, 'Resistance to Financialization: Insights About Collective Resistance Through Distancing and Persistence from Two Ethnographic Studies' (2014) 3(2) *Journal of Organizational Ethnography* 169.

[12] Lorraine Talbot, 'Why Shareholders Shouldn't Vote: A Marxist-progressive Critique of Shareholder Empowerment' (2013) 76(5) *The Modern Law Review* 791; Charlotte Villiers, 'Has the financial crisis revealed that responsible ownership is a myth?', in Ian MacNeil and Justin O'Brien (eds), *The Future of Financial Regulation* (Hart, 2010).

[13] Eugene Fama, 'Agency Problems and the Theory of the Firm' (1980) 88 *Journal of Political Economy* 288; Frank Easterbrook and Daniel Fischel, 'The Corporate Contract' (1989) 89 *Columbia Law Review* 1416.

A more optimistic position characterises the ideas of stewardship and sustainable finance, whose proponents believe that an efficient system of accounting and transparency, coupled with the internalisation of the environmental and social impact of economic activities, provides an opportunity to improve the economy and reduce externalities.[14] Although finance is seen as distant and removed from the real life of the agri-food system, any change in their conduct would generate a positive domino effect that would reach the four corners of the planet because of the intangible connections that equity, debt and derivatives create between financial hubs and the territoriality of every investment that they realised. When the financial sector intervenes in the production, transformation and distribution of food, it could be said that their investments may operate as 'legal chokeholds',[15] i.e. leverage points for legal interventions aimed at challenging misconducts across the food chains and increasing liability.[16]

In the context of opposing paradigms, this contribution reflects on the potential and limits of leveraging finance as a 'legal chokehold' to improve the social and environmental quality of the global food system. After an introduction on the financialisation of food and the notion of chokeholds, this paper uses concrete examples to discuss the potential and limits of organising around 'leverage points' that are both external (mandatory rules, limits to commodity trading, etc.) and internal (Principle for Responsible Investments, shareholder activism, etc.) to the financial sector. Halfway between external and internal, the European Union (EU) Directive 95/2014 on non-financial reporting is discussed in Section III as a mixed mechanism of engagement with finance, a European meta-regulation that may help mapping, exposing and (possibly) challenging the actions of those who really benefit from the financialisation of the transnational food regime. Yet, the conclusions reflect on the inherent limits of a strategy that engages with finance without addressing the systemic and inherent problems that arise when the food chain is structured around the premises and objectives of finance.

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[14] Frank Curtis, Ida Levine and James Browning, 'The Institutional Investor's role in 'responsible ownership'', in Ian MacNeil and Justin O'Brien (eds) *The Future of Financial Regulation* (Hart, 2010); David Monciardini, 'The 'Coalition of the Unlikely' Driving the EU Regulatory Process of Non-Financial Reporting' (2016) 36(1) *Social and Environmental Accountability Journal* 76.

[15] Tomaso Ferrando, 'Land Rights at the time of Global Production: Leveraging Multi-Spatiality and 'Legal Chokeholds'' (2017) 2(2) *Business and Human Rights Journal* 275.

[16] Deborah Cowen, *The Deadly Life of Logistics* (University of Minnesota Press, 2014); David Harvey, *The Enigma of Capital and the Crises of Capitalism* (Profile Books, 2010).

I. Financialisation of the transnational food chain: speculation, indexes and more

Financialisation has been described as “the increasing role of financial motives, financial markets, financial actors and financial institutions in the operation of the domestic and international economies.”[17] This mainly assumes the form of dividends, interests on debt or remuneration of financial instruments like derivatives and indexes. The macro and micro components of our socio-economic system are thus increasingly defined by the pressure that financial actors exercise to generate returns on an increasing amount of investments. Decisions made in a few offices by men in suits are redefining the economic system and, at the same time, redesigning individual lives. Let’s take two examples: as we are all aware, the 2008 global financial meltdown was deeply determined by the combination of collateralisation, securitisation and the creation of money through debt (itself a financial product). At the other extreme of the spectrum, the pensions of millions of workers all over the world depends on the financial strategy of investors who are entrusted with their savings and whose job is to invest workers’ savings today so to guarantee their pensions in the future. Through finance, global and local intensify their interconnection.

From the point of view of the food system, the first evidence of financialisation reaching the broader public was with the 2008-2010 food crisis, when a combination of derivatives, grain stocking and climate events led to price spikes, hunger and riots.[18] However, financial capital is increasingly involved in the definition of what food is produced, where, how and for whom. It is transforming food production and consumption according to investors’ desire for a stable return on their investment rather than by the wider needs of people and ecological limits.[19] According to Burch and Lawrence, in 2009 the food regime was already heading towards a situation where:

> a number of financial institutions and instruments that have the capacity to re-organise various stages of the agri-food supply chain, and to alter the terms and conditions under which other actors in the chain can operate. In the case of the private equity company, for example, we see a fraction of capital which views the agri-food company—whether it is a third-party auditor, an input supplier, a farm operator, a food manufacturer or a retailer—as a bundle of resources which provide opportunities for a quick profit, which may or may not involve a restructuring, but which will

[17] Gerald Epstein (n 3) 3.

[18] Russi (n 1); Steve Wiggins and Sharad Keats, *Grain Stocking and Price Spikes* (Overseas Development Institute, 2011).

[19] David Burch and Geoffrey Lawrence (n 1) 267; Philip McMichael, ‘A Food Regime Genealogy’ (2009) 36(1) *The Journal of Peasant Studies* 139; Harriet Friedmann, ‘Commentary: Food Regime analysis and Agrarian Questions: Widening the Conversation’ (2016) 43(3) *The Journal of Peasant Studies* 671; Jennifer Clapp and Ryan Isakson, *Speculative Harvest. Financialization, Food and Agriculture* (Fernwood Publishing, 2018).

eventually return the enterprise to the share market and then move on to another bundle of resources.[20]

That transnational food production is on the radar of financial investors is not a mystery. Financial advisors, pension funds managers and brokers from the four corners of the planet are open and transparent in highlighting the economic potential of investing in food. This is often justified by the food needs of a growing population, the shift in diets towards a Western model of consumption, the scarcity of resources, the possibility to extract resources controlling logistics, and the possibility of return represented by controlling one of the essential elements of life. Not investing in food would be a loss opportunity.[21] A narrative that is shared with multi-lateral agricultural projects like the G8 New Alliance on Food and Nutrition Security and the Agenda 2030, in particular of Sustainable Development Goal 2 on Zero Hunger and Goal 17 on Partnership for the Goals.[22]

Throughout the world, financial capital is distributed along the food chain so that corporations are acquired, merged, invested and reorganised according to principles of effectiveness, efficiency and financial return. Although more liquidity may lead to a strengthening of the sector, what is happening is a radical transformation. We only need to spend six minutes watching a short video telling the story of Richard David and Desmond Cheung, co-managers of the BlackRock Global Fund—World Agricultural Fund, to have a sense of the scale of the issue already back in 2011.[23] In the video, the two financers share their experience on the ground, meeting with corporations and people working for them, with the aim to convince the viewer (a possible investors in the Fund) that investing in land, traders, seeds companies and retailers is safe and profitable. Not only they are sharing their consideration on the current food system, but they are making projections about the future of food and what the food system is that they envisage, i.e. they believe that money could be generated in the future.

The financialisation of the food system means, therefore, to allocate resources according to Richard and Desmond's vision (or any other financer's vision), to invest them where analysts believe the highest

[20] David Burch and Geoffrey Lawrence (n 1) 275.

[21] Lutz Goedde, Maya Horii, and Sunil Sanghvi, 'Pursuing the global opportunity in food and agribusiness' (McKinsey & Company, July 2015) < https://www.mckinsey.com/industries/chemicals/our-insights/pursuing-the-global-opportunity-in-food-and-agribusiness> accessed 17 December 2018; Financial Tribune, 'Advantages of Investment in Food Industry' (Financial Tribune, 18 March 2015) <https://financialtribune.com/articles/economy-domestic-economy/13557/advantages-of-investment-in-food-industry> accessed 17 December 2018; Caroline Bergdolt and Anuradha Mittal, 'Betting on World Agriculture: US Private Equity Managers Eye Agricultural Returns' (2012) The Oakland Institute.

[22] United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development* (UN Publishing, 2015).

[23] BlackRock, *BlackRock Global Fund – World Agricultural Fund* (2011), online:<https://www.youtube.com/watch?v=AMYPPalcoac>.

profits can be generated. From farm to fork, the food chain is witnessing acquisitions, mergers, vertical and horizontal concentration, investments in commodity indexes, purchases of lands, an increasing use of debt as a mechanism to support agricultural activities and an intense competition for futures and other financial instruments that can reduce the risk over the investment. Two financial actors (Vanguard and BlackRock) were the main investors in four seeds and chemical companies that recently gave birth to two of the three largest mergers in the sectors of seeds and agricultural inputs (Monsanto and Bayern, Dupont and DowChemical). Similar scenarios characterise global supermarket chains, logistic companies, farmland, food processors and retailers.

Decisions made in a few hubs by a few investors are creating networks and threads that connect geographies and people through common investors that see in that business a potential for financial return. BlackRock, for example, keeps together farmers, trades and consumers across different sectors and different parts of the world, and in December 2018 the Norwegian Pension Fund had investments in more than 9,000 companies in 72 countries. A sense of the widespread nature of finance and the 'hub' role of few actors is evident.[24] Financial connections and financialisation go beyond the material interactions of the transnational food chains and are obliquely operating across commodities and sectors. If finance is the main driver behind the transformation of the global food system, it is increasingly the target of dissent and resistance.

Throughout the world, the desire to react against the implications and consequences of financialisation has favoured the emergence of a series of local and global reactions: sometimes they overlap but they seldom coordinate. As discussed in the next sections, some interventions try to subordinate finance to the superior authority of the state and bring the state-market relationship closer to the former,[25] while others operate within a context of coexistence between the localism of the environmental and human rights violations (material or potential) and the global expansion of financial capital that cuts across borders and reaches multiple geographies. For the supporters of the latter approach, the idea is that in the context where financial players own the equity or debt of thousands of companies around the world, it is more effective to challenge the source of funding rather than engaging with the companies operating on the ground. Like a revised version of the trickle-down economy, the expectation is that a change at the top of the financial pyramid may trickle down to the ground. This difference of approach between opposition and coordination is what I define as the 'without or within', which I discuss in the next Section.

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[24] Norges Bank Investment Management, 'Government Pension Fund Global – The Fund' (2018), online: <https://www.nbim.no/en/the-fund/>.

[25] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001).

II. Reacting without or within the system?

The recent history of resistance against the financialisation of the food system is characterised by a series of attempts to expand the objectives of legal activism and directly targeted financial actors rather than (or together with) the companies that receive funds from them. As discussed in Section *II.a* below, some actors have tried to leverage public law and the existence of top-down legal constraints and sanctions. Among the tools that belong to this category, there are regulatory changes, new interpretations of the legal framework and the strategic use of litigation to obtain new judicial implementation of the existing discipline. On the other hand, Section *II.b* focuses on interventions that are embedded in the vocabulary and vision of finance, like the adoption of investments standards as a comparative advantage, the recognition of the financial relevance of non-financial risk and the divestment from stranded assets. In this latter case, the financialisation of the food system is not necessarily 'the enemy' but a possible ally in the improvement of the global food chain. While the former category challenges the financial system from the outside, the latter gathers experiences that are fully embedded in the premises and mechanisms of the financialised economy and aims to twist it to its own assumptions.

II.a Reacting from outside: bringing finance under public control

Around the first decade of the 2000s, the value of Canadian farmland had been steadily increasing by 14.5 percent.[26] In response, the national government of Saskatchewan proposed legislation forbidding the purchase of agricultural land by pension funds: independently from their nationality, financial actors should not have been allowed to access land and bring up the prices. [27] Around the same time, the Canadian Province of British Columbia was, reportedly, considering the introduction of extra taxation for those investors purchasing agricultural land for speculative and non-agricultural purposes.[28] In both cases, a regulatory intervention justified by the need to protect the agricultural nature of land, would impact existing and future investment strategies and reveal the possibility for public actors to contribute to the allocation of the resources that are responsible for the production of food. In this context, an intervention of the legislator that is territorially framed and limited by the jurisdictional boundaries of the Province would have achieved the desired outcome: the sole objective was to regulate what happens under the authority of the government and prevent the subordination of land to the global interests of finance.

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[26] Ibid.

[27] Jacqueline Nelson, 'Saskatchewan Stops Pension Funds from Buying Farmland as Prices Rise' *The Globe and Mail* (13 April 2015).

[28] Mark Hume and Kathy Tomlison, 'B.C. considers tax changes for farmland speculators' *The Globe and Mail* (20 November 2016).

Another example is represented by the legal measures adopted (or proposed) by local and national authorities in the attempt to reduce the negative consequences of speculation on food. On the wave of the 2008-2010 food price peak, proposals were advanced in the USA, Switzerland and the EU to limit the possibility of trading in commodity derivatives and agricultural derivatives more specifically. In all these cases—which obtained different levels of support and success—members of the civil society, farmers associations, NGOs and some regulators united around the desire to stabilise the commodity market and introduce regulatory reforms that would 'include strict, legally binding and ex ante 'position limits', i.e. clear measures that would restrict the number and/or the value of commodity derivatives contracts ('positions') held by financial player.'[29]

Of the three experiences mentioned above, one of the most interesting was launched in Switzerland at the beginning of 2016. A referendum was held under the name 'No speculation of foodstuffs' with the intention of curbing dramatic price rises on foodstuffs by restricting financial institutions from speculating on food and agricultural commodities.[30]Although it was defeated with 60 percent of the vote, the initiative highlighted the connection between Switzerland and the global food chain, but also the possibility of directly involving citizens in the West in decision affecting the transnational actions of financiers and the lives of people all over the world. Despite the land-locked nature of the country that positions it far from most physical trading routes, Switzerland represents the world's most important trading hub with as much as one-third of the global transit trade in vital commodities such as oil, metals and agricultural goods that is realised by Swiss companies,[31] most of which engage in hedging, speculative trading and OTC investments.[32] Instead of assuming a protective and introverted approach to finance, as in the case of land acquisitions, the Swiss referendum would have been an expansionist and extroverted attempt to leverage the economic and legal 'weight' that a jurisdiction plays in the global food chain.

The EU offers another interesting example of the possibility for regulators to redefine the relationship between financial actors, derivatives and commodities such as food. Since the 3rd January 2018, position limits on financial derivatives have become a reality in the EU. [33] According to the Markets in Financial Instruments Directive, national competent authorities are now required to establish and enforce a maximum amount of commodity derivatives that a person can hold at all times with the aim of preventing

[29] SOMO, 'Building a Coalition Against Food *Speculation* (2011), online: <https://www.somo.nl/building-a-coalition-against-food-speculation/ >.
[30] Anand Chandrasekhar, 'Game Over for Food Speculation Initiative' *Swissinfo* (28 February 2016).
[31] STSA, Commodity Trading in Switzerland, (STSA, 2016), online: <https://stsa.swiss/knowledge/switzerland>.
[32] PWC, The Hand that Rocks the Cradle -Regulation and the Future of Commodities Trading in Switzerland (2015) online: <https://news.pwc.ch/wp-content/uploads/2015/11/commodity-trading-event_ge_25.11.2015.pdf>.
[33] Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II).

market abuse and market distorting positions. Above all, the aim of the Directive is to avoid the convergence between prices of derivatives and the spot prices for the underlying commodity,[34] a conjuncture that was considered by some authors one of the main drivers of the 2008 peak in food prices.[35] Of the nine commodities that are covered by the directive, three are food: London cocoa, Robusta coffee and white sugar.

It is too early to assess the impact of the Directive on speculative practices that often prejudice small-scale farmers. In the future, it will be of particular interest to enter into the details of national implementation and assess the material impact that they have had on investors, farmers and all the other actors operating along the three chains. Despite the partiality of the Directive's scope (derivatives are issued in connection with several more food commodities) and the fact that it does not ban speculation on food commodities (i.e. the purchase of derivatives independently from the interest in the underlying commodity), the EU Directive and the other interventions like the Swiss referendum have the merit of proposing strategic thinking about trading regulation as the link between the materiality of food shortages and the global nature of finance. If the peak in prices that negatively affected millions of people all over the world was the result of the speculative practices taking place in few stock exchanges under specific rules, these proposals may help delinking the food system from speculative interests.[36]

A third external reaction against the financialisation of the food system may come—unexpectedly—from competition law and the regulators' interest in looking closely at the fact that few financial players hold relevant amounts of shares in undertakings that are competing for the same market. This situation, which is technically known as 'horizontal ownership',[37] has been neglected in the scholarship and only recently has obtained some attention from academics and practitioners,[38] probably due, in part, to the recent acquisition of Monsanto by Bayer. In that case, BlackRock and Vanguard, two of the largest financial actors in the world, were major shareholders in both companies and thus significantly increased

[34] BaFin, *Position limits for commodity derivatives* (2018), online:<https://www.bafin.de/EN/Aufsicht/BoersenMaerkte/PositionslimitsWarenderivate/positionslimits_warenderivate_node_en.html>.
[35] Russi (n 1).
[36] Ibid.
[37] Einer Elhauge, 'Horizontal Shareholding' (2016) 109 *Harvard Law Review* 1267.
[38] Eric Posner, Fiona Scott Mortong and E. Glen Weyl, 'A Proposal to Limit the Anti-Competitive Power of Institutional Investors', Antitrust Law Journal (Forthcoming); Ioannis Lianos, 'The Bayer Monsanto/Merger: a Critical Appraisal' (2018), Report submitted to the German Parliament (Bundestag), 32

their power in the seeds and chemical sector after the deal was cleared.[39] In order to take finance seriously,[40] it would be the task of national competition authorities (and of the European Commission in the case of the EU) to shift their attention from the concentration in the market to the concentration at the financial level and assess its implications in terms of competition, effectiveness and distortion of the economy.[41] However, it seems that financial concentration and the common ownership across the food chain are far from being taken into consideration (or even considered at all). In the Bayer/Monsanto case, to give an example, the European Commission required Bayer to divest parts of its business and identified BASF as the purchaser. Although an analysis was proposed on the anti-competitive impact of this structural reconfiguration, the Commission completely overlooked the fact that BlackRock and Vanguard—leading shareholders in the two merging companies—are also leading shareholders of BASF.[42]

As these examples reveal, there are multiple ways in which public authorities (regional, national and local) can limit the operations of financial actors and the financialisation of the food system. They can single out institutional investors when it comes to having access to land, impose new rules for publicly traded financial instruments and adopt an approach to competition law that is more attentive to the role of finance in defining the economy. In all these cases, territories and jurisdictions are connected by the financial ties of the global chain of food production, so that changes operating within them are not all the same when it comes to defining the content and procedure of the financialised food system. Legal bottlenecks, chokeholds, barriers and leverage points do exist or can be created—even when we talk about finance.[43] The tendency is, however, to engage finance from within.

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[39] Reuters, *Major Syngenta shareholders would back Monsanto bid around $50 bln* (2015), online: <http://www.reuters.com/article/syngenta-ma-investors/major-syngenta-shareholders-would-back-monsanto-bid-around-50-blnidusl5n0xz3v720150508>.

[40] iPES-Food, *Letter to the European Commission on the Bayer-Monsanto merger* (2017), online:< http://www.ipes-food.org/images/CoreDocs/IPES-Food_Bayer-Monsanto-merger6.10.2017.pdf>.

[41] Jose Azar, Martin C Schmalz and Isabel Tecu, 'Anticompetitive Effects of Common Ownership' (2018) 73(4) *Journal of Finance* 1; Einer Elhauge, 'The Increasing Evidence that Horizontal Shareholding is Distorting Our Economy' (29 June, 2017), Harvard Law School Forum on Corporate Governance and Financial Regulation, online: <https://corpgov.law.harvard.edu/2017/06/29/the-increasing-evidence-that-horizontal-shareholding-is-distorting-our-economy/>; Einer Elhauge, OECD, 'Tackling Horizontal Shareholding: An Update and Extension to the Sherman Act and EU Competition Law-Note by Einer Elhauge (6 December 2017), online:< https://one.oecd.org/document/DAF/COMP/WD(2017)95/en/pdf>; Eric A. Posner, Fiona Scotto Morton and E. Glen Weyl, 'A Proposal to Limit the Anti-Competitive Power of Institutional Investors' (2017) *Antitrust Law Journal* (forthcoming).

[42] Jennifer Clapp and Ryan Isakson (n 2).

[43] Deborah Cowen (n 16); David Harvey (n 16); Tomaso Ferrando, 'Land Rights at the Time of Global Production: Leveraging Multi-Spatiality and 'Legal Chokeholds'' (2017) 2(2) *Business and Human Rights Journal* 275.

II.b Reacting from within: the food chain through financial lenses

Actions that challenge finance from within can be categorised according to the mechanism and the objectives. With regards to the former, we can identify two macro-groups: interventions that leverage the ethical and reputational component of financial investors and those that mobilise the environment and society as non-financial considerations that funds' managers have the duty to consider when they act in the best interest of their funds' members.[44] Through the years and across different sectors, civil society, NGOs, regulators and investors themselves have been ideating and implementing strategies and interventions that can be located in a chart that has objectives and leverage points as its two axes. As discussed below, some cases were characterised by third parties' decision to impact one specific investment, while in other circumstances they aimed to shift any investment realised by a particular financial actor. Independently from where the actions are located, they all have in common the intention to engage with finance from within to generate material improvements in the real economy. Four examples are presented below to provide some food for thought about the combination between objectives and leverage points and to contextualise the EU Directive that is discussed in section III: the Principles for Responsible Investments; two examples concerning concentrated animal factories operations (CAFOs); the use of debt relationships as a leverage for change; and divestment from unsustainable operations in the name of the fiduciary duty towards members.

One of the oldest initiatives concerning international investors was the creation of the United Nations Principles for Responsible Investments (PRI), a network of (now) more than 2,000 financial actors which rotates around six voluntary recommendations elaborated by a group of financial experts. These recommendations express the importance of bringing environmental and social governance (ESG) considerations into existing approaches to investments in order to make them less risky and therefore more resilient.[45] Members of the PRI report on these six recommendations and the way in which they are performing them. The PRI have been appreciated because of their systematisation and translation into ESG terminology regarding several circumstances that are faced by companies all over the world. However, they have been criticised for their open and non-binding nature, which is only partially counterbalanced by the fact that annual reporting is a condition to remain part of the scheme.[46]

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[44] Christine Berry, 'Fiduciary Duty and Responsible Investment: An Overview', in Karen Wendt(ed), *Responsible Investment Banking* (Springer, 2015).
[45] Rolf D Häßler and Till Hendrik Jung. 'In Principle Good: The Principles for Responsible Investment', in Karen Wendt (ed) *Responsible Investment Banking* (Springer, 2015).
[46] PRI, *Reporting for Signatories* (2018), online: https://www.unpri.org/signatories/reporting-for-signatories.

Concerning transnational food chains, the PRI network has contributed, among other things, to the education of the financial sector on the relevance of ESG and has produced specific guidelines and recommendations that aim at nudging investors to consider the way in which climate change, poor conditions of labour and the excessive use of water may generate negative returns. For example, PRI and the WWF recently published an Investor guide on water risks in the agricultural supply chain which recognises agriculture as the world's largest user of water[47] and presents it as a risk for investors that must be understood, mitigated and integrated into their financial analysis.[48] Similarly, the network published an online resource entitled 'Engage the Chain: An Investor Guide to Agricultural Supply Chain Risk' that provides investors with information about the social and environmental impacts driving material business risks for eight key commodities: beef, corn, dairy, fibre-based packaging, palm oil, soybeans, sugarcane and wheat[49] and launched a collaborative programme on deforestation that recognises the financial risk of cattle raising.[50]

In terms of leverage points, the PRI clearly stresses that responsible investment is not a matter of ethics but of fiduciary duty.[51] The adoption of the principles and of its ESG guidelines should thus be of interest to all financial actors, including those unconcerned by ethical or moral considerations, because it has to do with the good financial performance of the investments and the satisfaction of the managers' mandate. 'To ignore ESG factors is to ignore risks and opportunities that have a material effect on the returns delivered to clients and beneficiaries,' it is stated on the PRI website. [52] This is an affirmation that clearly illustrates the priority of financial motivations behind the establishment of the principles. If financial

[47] OECD, *Water Risk Hotspots for Agriculture* (OECD Publishing, 2017).
[48] PRI and WWF, *Growing Water Risk Resilience: An Investor Guide on Agricultural Supply Chain* (2018), online: <https://www.unpri.org/download?ac=4195>.
[49] Ceres, *Engage the Chain,* (2018), online < https://engagethechain.org/>.
[50] Principles for Responsible Investments, *PRI and Ceres Open Collaborative Engagement on Deforestation to Global Investors* (2017), online: < https://www.unpri.org/news-and-press/pri-and-ceres-open-collaborative-engagement-on-deforestation-to-global-investors/350.article>.
[51] The notion of 'fiduciary duty' itself has been the object of controversies and legal challenges. The traditional vision, for example, considers that '[t]rustees have a legal duty to not only invest, but to actively seek the best possible financial return . . . even if it is contrary to the personal, moral, political or social views of the trustees or beneficiaries.' This would mean that any ESG consideration would be taken into consideration only if financially superior to the non-ESG option, despite the ethical and moral desire of beneficiaries. See, e.g., Principle for Responsible Investments, *Fiduciary Duty* (2015), online: <https://www.unpri.org/fiduciary-duty/fiduciary-duty-in-the-21st-century/244.article>; Principle for Responsible Investments, Fiduciary Duty in the 21st Century (2018), online: < https://www.unpri.org/fiduciary-duty/fiduciary-duty-in-the-21st-century/244.article>; ClientEarth, *Shell Pension Fund Member Warns of Legal Action* (2018), online: <https://www.clientearth.org/shell-pension-fund-member-warns-of-legal-action/>; Sarah Barker, Mark Baker-Jones, Emilie Barton and Emma Fagan, 'Climate Change and the Fiduciary Duties of Pension Fund Trustees- Lessons from the Australian Law (2016) 6(3) *Journal of Sustainable Finance and Investment;* Christine Berry and Charles Scanlan, 'The Voice of the Beneficiary', in James P Hawley et al. (Eds.), *Handbook of institutional investment and fiduciary duty* (Cambridge University Press, 2014).
[52] Principle for Responsible Investments, *What is Responsible Investment?*, online: <https://www.unpri.org/pri/what-is-responsible-investment>.

performance is the leverage, stable returns on investments is the objective reached through voluntary adoption; there is no requirement that investors rule out investments or divest from companies that do not reach a specific ESG threshold.

Differently from the fourth example provided below, and because the focus of PRI is the financial opportunity represented by ESG-performing investments and of the flexibility in the implementation, the scheme supports engagement with the investee with the aim of improving their conduct rather than advocating divestment. Yet, the primacy of financial performance and the the voluntary nature of the scheme determine the need to make a business case for the adoption of ESGs[53] and that little is done by investors and companies until the materiality of the ESG is proved and evident. For example, in Brazil several institutional investors, banks and insurers have signed up to the PRI and the Principles for Sustainable Insurance (PSI). Nevertheless, in 2015 the country still supported cattle ranching, agriculture, fishing, and food and beverage companies with a high ESG risk profile, perfectly illustrating this limitation.[54]

A second example concerns factory farming. There, investors' eagerness to capitalise on the ongoing increase of world meat consumption is integrated in two initiatives, the Farm Animal Investment Risk and Return (FAIRR) and the Business Benchmark on Farm Animal Welfare (BBFAW), which look at Concentrated Animal Factory Operations (CAFOs) from the perspective of risk and financial return. As evident from the presentation of BlackRock's World Agricultural Fund discussed at the beginning of this paper,[55] financiers are betting that while the world will continue consuming animal protein, this will consist of better proteins, and are therefore channelling their funds to companies that adopt this same vision. And even if meat was completely replaced by synthetic meat or other foodstuffs, this change would probably be supported by a massive flow of financial capital. Without entering into the details of these projects, both initiatives are of interest because they attempt to translate animal welfare into something more than matters of ethics, rights and compassion: animal welfare is translated into financial terms to redirect investment strategies.

BBFAW is a benchmark that ranks how the world's leading food companies are managing and reporting their farm animal welfare practices. By ranking companies, they aim to attract investors and

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[53] Gunnar Friede, Timo Busch & Alexander Bassen, 'ESG and financial performance: aggregated evidence from more than 2000 empirical studies' (2025) 5(4) *Journal of Sustainable Finance & Investment* 210.

[54] Danielle Carreira, Aaron Re'em and Miriam Tarin, Trucost, *Natural Capital Risk Exposure of the Financial Sector in Brazil* (2015), online: <http://cebds.org/wp-content/uploads/2015/07/GIZ-Natural-Capital-Risk-Exposure.pdf>.

[55] BlackRock (n 2).

consumers to those performing best and to sanction those at the bottom by indirectly making access to capital more expensive, thereby triggering positive reactions. FAIRR is a project launched by a private equity manager that reinterprets animal protein production (livestock and fisheries) through 28 ESG criteria and the Coller FAIR Protein Producer Index. For FAIRR, animal protein production is a matter of reputation, human health, regulatory compliance, climate change, deforestation,[56] local community support and, ultimately, longer-term returns.[57] The bottom-line is that better production means higher returns and lower financial risk and that investors should put their money where the combination of these two elements is most effective.

In FAIRR's words: "[m]ore humane farming practices tend to be more productive too. For example using 'controlled atmosphere killing' as a method of slaughter for chickens is described as both more compassionate and more cost-effective. Similarly, pasture-based grazing for cows means less stress and therefore more lactation cycles over their lifetime."[58] In FAIRR's approach to the food chain, livestock and fish are proteins with a financial value and a risk. The vocabulary and the investment strategies are not defined by ethical or moral considerations, although reputation is considered. In this vision, CAFOs are like 'new coal'; stranded assets with no future value that should be abandoned by means of improvement or divestment.[59] Meat consumption and slaughtering are not problematised *per se*, but rather seen as a reliable source of income because of the changing dietary patterns in emerging countries.

[56] FAIRR is one of the promoters, along with six transnational food companies, of the Cerrado Manifesto, a pledge to work with local companies in Brazil to reduce the conversion of forest into soy production. The wording and aims of the Cerrado Manifesto trigger several considerations that can only be sketched here. The Manifesto is a chain-based approach to deforestation that also involves financial actors; it is a recognition of the link between meat production and deforestation, although through the medium of soy; it states that local companies are under pressure to convert land and therefore a 'coalition of the willing' should be established to steer local actors towards more sustainable practices; it affirms that the legal standards of the Brazilian Forest Code are insufficient to prevent deforestation and therefore the higher private standard suggested by the coalition should be implemented. Finance and companies on the ground are thus coordinating to change production patterns, a process that would be of interest both for competition lawyers and for academics interested in private regulation and private legal transplant. On private legal transplant, see Tomaso Ferrando, 'Private Legal Transplant: Multinational Enterprises as Proxies of Legal Homogenization' (2015) 4(1) *Transnational Legal Theory* 20. The Cerrado Manifesto is available online. FAIRR, *Cerrado Manifesto* (2018), online: https://cerradostatement.fairr.org/.

[57] FAIRR, *Considering Farm Animal Welfare in Investment Decision-Making-Case Studies and Guidance* (2015), online: <http://www.fairr.org/wp-content/uploads/FAIRR-Case-Studies-and-Guidance-June-2015.pdf>.

[58] *Ibid*, 3.

[59] The 2015 FAIRR Report contains one reference to divestment, that of Boston Common Asset Management from a company that appeared in breach from the organic requirements despite advertising its milk as organic. See FAIRR, *ibid*, 11.

A third kind of engagement with finance and the food chain is characterised by WWF and Greenpeace's separate campaigns against Banco Santander[60] and HSBC.[61] There, the two international NGOs decided to leverage debt as a means to stop ongoing deforestation and the killing of orangutans connected with palm-oil production. In those cases, the two NGOs mapped, identified and targeted specific loans that Santander Bank and HSBC had provided to palm-oil companies and leveraged the reputation of the two banks to prevent the renewal of the financial support. Rather than concerning the overall portfolio of the banks or suggesting that the banks engage with the two company, WWF and Greenpeace pushed for a visible financial sanction that—they intended—would make it more expensive for the company to obtain funds. Similarly, FIAN international recently denounced the human rights violations connected with the actions of an agribusiness companies operating on contested land in the Matopiba region of Brazil.[62] Unlike other cases of anti-land grabbing resistance, the objective was not to identify the companies that were directly responsible for the enclosures, but to connect the operations on the ground with the global financial system and pressure the Swedish National Pension Scheme—which had invested in the operations—to divest.[63]

Because companies raise funds through equity and debt, we could thus imagine potential actions targeting not only shareholders but also bonds' subscribers and loans providers that are directly supporting companies that market genetically modified organisms (GMOs), use slave and child labour, are responsible for the appropriation of water and biodiversity, or contribute to non-communicable diseases because of the poor nutritional content of the food that is produced. Unlike a pure financial approach, the actions mentioned here were not constructed around the financial unsustainability of the investment and the viability of the divestment, but on the reputational implications of non-divesting and on the power of naming and shaming.

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[60] Richard George, Green Peace, 'Result: Santander Stops Financing Forest Destroyer APRIL', (26 February, 2015), online:<https://www.greenpeace.org.uk/result-santander-stops-financing-forest-destroyer-april-20150226/>.

[61] Anna Rahmawati, Green Peace, 'HSBC Promises to Cut Ties with Forest-Trashing Palm Oil Companies', (21 February, 2017), online: <http://www.greenpeace.org.uk/hsbc-promises-cut-ties-forest-trashing-palm-oil-companies-20170221>.

[62] FIAN, *Land Grabbing and Human Rights: the Role of EU Actors Abroad* (2017), online: <http://www.fian.org/fileadmin/media/publications_2017/Announcements_Calls_Flyer/WEB_Eng.pdf>.

[63] In a 2011 study of five investment funds falling under the Swedish national pension fund, Hamilton and Eriksson present a set of influence factors that were used by civil society actors to convince the funds' managers to take ESG into considerations and redefine their investment strategies. See, Ian Hamilton & Jessica Eriksson, 'Influence strategies in shareholder engagement: a case study of all Swedish national pension funds' (2011) 1(1) *Journal of Sustainable Finance and Investment* 44. For a similar research on the Dutch fund, see Frank AJ Wagemans, CSA (Kris) van Koppen & Arthur PJ Mol, 'Engagement on ESG issues by Dutch pension funds: is it reaching its full potential?' (2018) 8(4) *Journal of Sustainable Finance & Investment* 301.

A fourth possible intervention is represented by the call for divestment, which can be both promoted on moral ground and/or on the basis of the legal consideration that investors have a fiduciary duty towards their members to move money away from risky or unsustainable operations that may affect the financial viability of the portfolios. In this latter case, activists, lawyers and civil society are not (only) exercising reputational pressure but have been working hard to build a financial case for divestment which is couched in the vocabulary and 'Return on the Investment' (ROI) perspective that financial actors are familiar with. At the core of these interventions is the transformation of ESG consideration into material financial risks and the capacity of the proponents to demonstrate that the fiduciary duty—and not the moral nature of the investor—requires certain sectors and companies to be ruled out as potential investments.

One of the more interesting aspects of the ongoing campaign to divest from fossil fuel—that could be transplanted into a potential campaign concerning the transnational food system—has been the identification of specific investors as preferred targets of the campaigns. The hope is that an operation realised by visible and financially relevant players could trigger a domino effect of competitors, whether because they mimic their investment strategies, do not want to lose clients concerned with the environment or society, or because they are worried of being the ones ending up with the worthless assets in their portfolios. When the Norwegian Pension Fund (the largest in the world which invests in more than 9,000 companies in 72 countries) proposed to drop any investment in fossil fuel in December 2018,[64] it communicated to the rest of the financial sector that it doubted the safety and reliability of this specific sector and forced investors all over the world to take the financial risk associated with climate change seriously.[65] As a proof of the complexity of the sector, the concentration of ownership that creates concern from the point of view of competition law, is often seen as a strong opportunity behind an effective divestment campaign.

What is often dismissed, is that any of the four tactics described above have required NGOs, civil society and the broader public interest in divestment to financialise their own vision of the world and their strategies. Bound by the need to produce technical arguments that resonate with the expertise and vocabulary of the financial sector, they may have abandoned or limited the use of other forms of resistance.[66] When ethics or morals are replaced (or rephrased) by accounting for sustainable finance,

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[64] Norges Bank Investment Management (n 24).

[65] Adam Vaughan, 'World's Biggest Sovereign Wealth Fund Proposes Ditching Oil and Gas Holdings' *The Guardian* (London, 16 Nov, 2017), online:< https://www.theguardian.com/business/2017/nov/16/oil-and-gas-shares-dip-as-norways-central-bank-advises-oslo-to-divest>.

[66] Divestment and ESG are a very technical sector dominated by the vocabulary, taxonomy and perspective of finance. NGOs engaging in this area, e.g. the World Wildlife Fund (WWF) have been adapting their narrative and strengthening their financial expertise. Such process, which may facilitate the dialogue with financial actors and investors, may be

fiduciary duty, ESG and the 'materiality of non-financial issues',[67] engagement embraces a very technical vocabulary and is forced to process, assess and organise financial data as investors do. This is what is happening with the EU Directive 95/2014 on sustainable finance and the ongoing operations of the EU High-Level Panel on Sustainable Finance concerning taxonomy and benchmarks. At their core, these two processes have the idea of promoting transparency, disclosure, financial accounting of non-financial issues and the identification of a common taxonomy that can reduce asymmetry of information. In order to make finance sustainable, it is often stated at the EU level, the cost of ESG accounting must be reduced by adopting a common language and by creating a common ESG level playing field where financiers can operate and allocate resources towards environmentally (and socially) sustainable projects. In the context of this paper, the EU Directive can be interpreted as a new space of interaction between financial capital, legislators and civil society. Thus, the next section engages with the main elements of the Directive as a possible (but inherently limited) leverage point in the struggle to address the main flaws of the transnational food regime.

III) Sustainable finance and the EU Directive 95/2014

In 2014, six years after Lehman Brothers filed for bankruptcy, the EU issued Directive 95/2014[68] with the aim to support and facilitate the provision of finance to investments taking into account ESG considerations.[69] From a technical point of view, the Directive amends the accounting directive 2013/34/EU[70] to introduce new accounting requirements for 'large undertakings which are public-interest entities exceeding on their balance sheet dates the criterion of the average number of 500 employees during the financial year' (Article 1).[71] This equally applies to companies that are national of a Member State

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seen as a form of elitism of environmental and social engagement and may pose problems in terms of communicability with the broader public and subordination to the premises and paradigm of the financial sector.

[67] The concept of 'materiality' of non-financial risks is central to the construction of the EU Directive 95/2014 on disclosure of non-financial considerations. The underlying assumption is that non-financial aspects of a company's activities (protection of the environment and respect of human rights, labour conditions, corruption, etc.), have or may have a financial—material—impact on the value of the shares or of the overall enterprise, thus affecting the performance of investors' portfolios. This means—among that non-material issues, i.e. risks that are borne by communities and the planet without any impact on the company's financial performance, may be invisible.

[68] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

[69] European Commission, *High-Level Expert Group on Sustainable Finance: Financing a Sustainable Economy* (European Commission, 2018).

[70] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC.

[71] Directive 95/2014, Article 1: 'large undertakings which are public-interest entities and to those public-interest entities which are parent undertakings of a large group, in each case having an average number of employees in excess

(incorporated in the EU), those that operate in the EU and whose EU operations reach that quantitative threshold, and parent companies of corporate groups that satisfy the same requirements (Article 3).[72]

According to the 2017 EU Commission's implementation Guidelines, the Directive applies to approximately 6,000 large companies and groups across the EU, including listed companies, banks, insurance companies and other companies designated by national authorities as public-interest entities.[73] In the global competition for foreign and national investments, the Directive starts from the assumption that '[g]reater transparency is expected to make companies (1) more resilient and perform better, both in financial and non-financial terms. Over time this will lead to more robust growth and employment and increased trust among stakeholders, including investors and consumers. Transparent business management is also consistent with longer-term investment.'[74] Environmental protection, social responsibility, treatment of employees, respect for human rights, anti-corruption and bribery and the diversity on company boards (in terms of age, gender, educational and professional background) are the areas that should benefit of the work of this new 'coalition of the unlikely.'[75]

In contrast to the fully privatised approach of the PRI or the regulatory approach utilised in the case of large-scale land acquisitions, the rationale behind the Directive is that it is possible to improve global capitalism through the interaction of states, market and civils society. The regulatory power, in this case both European and national, identifies and implements new disclosure requirements; investors select where to invest according to the information on their material ESG impacts; civil society can name and shame companies that disclose that their practices have negative effects (or risk them) or that do not disclose material conditions that should have been disclosed. Viewing the Directive from the perspective of the labyrinth of the financialised and transnational food chain, there are three main reasons to suggest it may act as a helpful tool to limit or redress current environmental and social degradation.

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of 500, in the case of a group on a consolidated basis. This should not prevent Member States from requiring disclosure of non-financial information from undertakings and groups other than undertakings which are subject to this Directive.'

[72] Directive 95/2014, Article 3: 'Public-interest entities which are parent undertakings of a large group exceeding on its balance sheet dates, on a consolidated basis, the criterion of the average number of 500 employees during the financial year shall include in the consolidated management report a consolidated non-financial statement containing information to the extent necessary for an understanding of the group's development, performance, position and impact of its activity, relating to, as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters.'

[73] European Commission, *Commission Guidelines on Non-Financial Reportin*g (European Commission, 2017) 2.

[74] *Ibid.*

[75] David Monciardini, 'The 'Coalition of the Unlikely' Driving the EU Regulatory Process of Non-Financial Reporting' (2016) 36(1) *Social and Environmental Accountability Journal* 76.

Firstly, the Directive would apply to financial actors themselves. This is evident from the 2017 Commission Guidelines, that identifies banking and insurance as two sectors whose members have to report.[76] Secondly, Member States have the option to extend this duty to other actors: as recently highlighted in a report by CSR Europe and the Global Reporting Initiative, eight Member States have decided to introduce an explicit reference to pension funds in their transposition of the EU directive.[77] Thirdly, financial investors themselves may have a number of employers and a financial turnover that passes the threshold for application of the Directive as required by Article 1(1). In the case of Norway, for example, the draft proposal for the national transposition of the Directive extends the duty to all companies with more than 500 employees and a net turnover of more than 40 million or a balance sheet total of over 20 million. In the absence of any exception for the Sovereign Wealth Fund, we could thus imagine that the largest shareholder in the world would have to submit a statement in line with the indications of the Directive.

The second reason why the Directive should be explored as a possible 'legal chokehold' in the complexity of the financialised food system is qualitative. Although not specifically mentioned in the Directive, Articles 1 and 3 contain broad references to the duty of disclosing 'as a minimum, environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters' which suggests that companies may be required to account for and reveal the material and potential impact of: labour practices including child labour and forced labour; precarious work; wages; unsafe working conditions including building safety, protective equipment, workers' health, trafficking in human beings and other human rights matters; greenhouse gas emissions; other types of water and environmental pollution; deforestation and other biodiversity-related risks.[78] The non-financial declaration would thus act as a map of the tensions and criticalities of the whole chain and a possible leverage for systemic interventions that go beyond punctual solutions.

Thirdly, the Directive and the Guidelines suggest that disclosure should be systemic and take the transnational nature of production seriously. According to the texts, undertakings have to adopt a chain-based approach to disclosure and present both positive and adverse material impacts of their operations.[79]

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[76] European Commission (n 71).
[77]CSR Europe and GRI, (2017) Member State Implementation of Directive 2014/95/EU. A comprehensive overview of how Member States are implementing the EU Directive on Non-financial and Diversity Information, Policy and Reporting. The countries are Bulgaria, Croatia, Lithuania, Poland, Portugal, Romania, Slovenia and Spain. Iceland too, as a member of the EEA, has included pension funds in its transposition of the Directive.
[78] Article 1, Directive 95/2014.
[79] The Directive discusses the chains-based approach in Recitals 6 and 8. Recital 8 of the Directive also indicates that 'the severity of such impacts should be judged by their scale and gravity. The risks of adverse impact may stem from undertaking's own activity or may be linked to its operations, and where relevant and proportionate, its products, services and business relationships, including its supply and subcontracting chains'. The 2017 Guidelines on non-

In the case of non-financial companies, the Guidelines clearly require that they assess the whole network of production and, whenever the information is relevant, proportionate and significative,[80] disclose all the material risks (actual or potential) that exist across different levels of production.[81] In the case of a financial institution like pension funds, chain-based approach and the disclosure requirement could be interpreted as an obligation to account for and reveal all the potential or present adverse material impacts of companies that receive equity or debt investments.[82] This is clarified by the Guidelines, which states that '[a] bank may consider that its own water consumption in offices and branches is not a material issue to be included in its management report. In contrast, the bank may assess that the social and environmental impacts of projects that it funds and its role in supporting the real economy of a city, a region or a country are material information'.[83] Although the Guidelines present a positive example, there is no reason why financial institutions should not equally communicate information concerning the excessive use of water, the impact on biodiversity, the land consumption, the risk for human rights, and several other material situations linked to one of their investments.

If we transpose this example to large financial institutions we may conclude that the Directive—depending on the way in which it has been transposed by Member States—may be interpreted not only as an opportunity for financial investors to learn about companies and define their investment strategies, but as a legal duty for pension funds, hedge funds, sovereign wealth funds, insurance companies, etc. to publicly disclose information concerning all the potential and actual risks hidden behind their existing investments. Of course, a lot depends on national legislations and their substantive and procedural content. Not surprisingly, the United Kingdom as an epicentre of global finance has a very limited list of public interest entities (listed companies, credit institutions and insurance understandings).

With the appropriate legal framework in place, in the future we could witness the Swedish and the Norwegian Pension Fund, the University Superannuation Scheme (UK), Alecta or the BT Group producing non-financial reports containing the significant material impacts of their investments. Then it would be up to accountants, Member State authorities and civil society organisations to check the declarations and

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financial reporting discuss the assessment of the chain in the Key Principles on disclosure of material information (section 3).

[80] European Commission (n 71).

[81] Ibid, 5 ff.

[82] The Commission Guidelines use the case of a bank to explain what it means in relation to materiality and key performance indicators (KPI). In the text, we read that 'A bank may consider that its own water consumption in offices and branches is not a material issue to be included in its management report. In contrast, the bank may assess that the social and environmental impacts of projects that it funds and its role in supporting the real economy of a city, a region or a country are material information.' European Commission (n 68) 6.

[83] *Ibid,* 6.

decide how they could be leveraged to sanction or prevent possible violations of the right to food, biodiversity, the environment (for example, deforestation), access and use of water (for example, the existence of a struggle with local communities for the resource),[84] workers' rights (for example accusations against the chocolate industry of benefitting from slave labour in its supply chain)[85] and other similar circumstances.

In addition, the Directive may have more 'teeth' than a traditional corporate social responsibility measure would have. Although the EU document is silent in terms of sanctions, all Member States beside Denmark, Estonia, The Netherlands and Spain have introduced non-compliance penalties. In the case of Italy, for example, the law that implements the Directive introduces sanctions as high as 150,000 Euros for the omission of relevant information, non-compliance, or failure to submit within the timeframe, to be paid by the physical person who is responsible for the declaration.[86] It is possible to imagine, although hard to see happening in practice, that the publication of the next non-financial reports of the largest financial actors in Europe will be followed with attention by civil society organisations, academics and activist lawyers interested in assessing gaps and misreporting, and that this could trigger the intervention of the national competent authorities and add an extra incentive for a behavioural change.

Of course, it is hard to see how institutional investors who own shares in 9,000 companies will be autonomously reporting any relevant material condition or potential risk. As a matter of fact, 'capital… will not voluntarily adopt restrictions and it will not bind itself to a company in the name of stewardship or an ecological and just food system'.[87] In addition, it would be naïve not to be aware of its limits. Throughout the Directive, the use of notions like 'proportionate', 'relevant' and 'significant', for example, leaves a great amount of discretion with the companies, in particular in those cases where there is little transparency about the suppliers and where the cost of obtaining the information would be particularly high. Similarly, not all the Member States have endorsed a mandatory approach to the content of the Directive, with countries like the United Kingdom (which is central to the global financial world) endorsing the principle of 'comply or explain' which provides companies with the possibility of not fulfilling the disclosure requirements yet

[84] David Agren, 'Mexico Protesters Fear US-Owned Brewery will Drain their Land Dry' (The Guardian, 4 February 2018), online: < https://waronwant.org/media/coca-cola-drinking-world-dry>.

[85] Emiko Terazono, 'Chocolate Industry Accused of Failure on Child Labour' (Financial Times, 18 April 2018), online: https://www.ft.com/content/eb58ba84-425f-11e8-803a-295c97e6fd0b; Rachael Revesz, 'Nestle is being sued for allegedly using child slaves on cocoa farms' (Independent, 11 January 2016), online: <https://www.independent.co.uk/news/world/americas/nestle-is-being-sued-for-allegedly-using-child-slaves-on-cocoa-farms-a6806646.html>.

[86] Legislative Decree 30 December 2016, n. 254.

[87] Lorraine Talbot (n 12) 816.

remaining in compliance by merely justifying the departure from the standard.[88] Moreover, Article 1(1)(e) of the Directive introduces the safe harbour exception, according to which

> Member States may allow information relating to impending developments or matters in the course of negotiation to be omitted in exceptional cases where, in the duly justified opinion of the members of the administrative, management and supervisory bodies… the disclosure of such information would be seriously prejudicial to the commercial position of the undertaking, provided that such omission does not prevent a fair and balanced understanding of the undertaking's development, performance, position and impact of its activity.

In the context of financial investors and the disclosure of information connected with their investment strategies, portfolio composition and financial performances, there is little doubt that this 'safety exit' could significantly reduce the Directive's effectiveness. Yet, the intervention of the Member States, civil society, watchdogs and international organisations interested in the respect of social and environmental rights (both at the regional and United Nations' level) may play an important role in strengthening the existing framework, addressing its limits and pushing for a quicker and more effective transition away from investments that generate returns through exploitation of people and the planet.

IV) Conclusions: towards a sustainable financialised food system or a de-financialised food system?

Financialisation is increasingly redefining the food sector and intensifying problems of homogenisation, deprivation and appropriation. Although the effects of an increased financial pressure on the food chain is often perceived by people and the planet, financial connections are often hidden behind complex legal and economic structures like special purpose vehicles (SPV)[89] that shield the identities of the final beneficiaries and increases the distance between violations and accountability. If we adopt the idea of 'root causes' coined by Susan Marks,[90] finance as the underling driver of food insecurity, land dispossession, loss of biodiversity and jobs, etc., often operates behind the logos of corporations, fiscal havens, SPVs and intermediaries.

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[88] CSR Europe and GRI (n 75).

[89] The term 'Special Purpose Vehicle' identifies legal entities that are created within the context of a global enterprise (corporate group, global value chains, etc) and are often used for financial and accounting purposes, such as shielding assets, hiding debt or realising specific investments. SPVs can be kept off the balance sheet of parent companies and corporate groups consolidated accounts, which means that its assets, liabilities and equity are often invisible to investors and third parties, reducing transparency, accountability and the effectiveness of the instruments like the Directive.

[90] Susan Marks, 'Human Rights and Root Causes' (2011) 74(1) *Modern Law Review* 57.

To give an example, the largest US teachers' pension fund, TIAA-CREF, doubled the amount of land that it owned in Brazil between 2012 and 2015. However, it did not do it by direct purchase (forbidden in Brazil), but by funding Radar Corporation, a Brazil-based company that appeared as the sole and legitimate owner. Similarly, Brazilian law-firms were recently denounced for aiding the Canadian group Brookfield to invest the funds from its Global Agricultural Investment Fund in a way that eluded the limit on foreign ownership of land in Brazil: instead of buying equity or land, they bought convertible bonds (a financial instrument) issued by the Brazilian company Emauba and obtained in exchange the guarantee of the payment of the 98.78 percent of the liquid profit generated by the company and the possibility to convert the bonds into shares when the ban on foreign ownership would be lifted. Financial and legal instruments become the way to avoid legal constraints and cover the roots of the problem.[91]

In the struggle to think about countermeasures and possible forms of intervention within the complex conundrum of financial investments, transparency certainly plays a central role. The ability to map financial ties is essential to open the possibility to leverage them, engage with legal and political arguments and obtain some transformations. Although we know that around 80 percent of the global equity market is held by financial institutions[92] and that BlackRock, Vanguard, Fidelity, and State Street now own around 88 percent of all stock in S&P 500 corporations,[93] we lack a clear understanding of the way in which financial capital is intervening all along the food chain and how it is horizontally and vertically integrated within it. As discussed in this article, initiatives have been launched both from within and without the financial sector in order to counter the increasing relevance of financial actors: public authorities have drafted ad hoc regulations on acquisition of land and derivative trading, networks have been established that promote voluntary principles for responsible investments and activists have used both naming and shaming and the fiduciary duties of trustees to push for engagement and divestment from unsustainable sectors.

In this picture, some (relatively unexpected) support may be offered from the implementation of the EU Directive 95/2014 and the introduction by each Member State of rules on the disclosure of non-financial (and diversity information) in annual reports from 2018 onwards. Officially, transparency and publicity would be used by investors to improve their portfolios and choose investments that have a better ESG profile and therefore a higher probability of generating long-term return. However, Member States can also decide that these requirements apply to investors and can provide sanctions in case of mis-

[91] Ibid.
[92] Charles McGrath et al (n 8).
[93] Jan Fichtner, Eelke M. Heemskerk and Javier Garcia-Bernardo, 'Hidden Power of the Big Three? Passive Index Funds, Re-Concentration of Corporate Ownership, and New Financial Risk' (2017) 19(2) *Business and Politics* 298.

compliance. In some cases, they already do.[94] Instead of helping investors to define their investment strategies, external stakeholders such as NGOs, civil society and legal activists could thus use the data disclosed by financial investors to scrutinise and challenge the role that their investments have in consolidating an unsustainable transnational food chain. However, this would require the institutional recognition of these actors' role in engaging with finance, the provision of a straightforward system that facilitate their role as watchdogs, and the "recognition of a strong hierarchical logic between all the elements commonly identified as pertaining to sustainable development,"[95] with democratic, open and effective governance at the centre rather than financial performances.

Yet, too much optimism would be misplaced for several reasons. To start with, corporate governance scholars have long pointed to the limits and flaws of engaging with institutional investors to transform them into stewards of the good functioning of global capitalism.[96] Similarly, the unilateral decision to engage (or withhold funds) with companies that operate in violation of legal or normative standards may reduce the unsustainability of the food chain but may also produce unexpected negative effects along the chain outside the control and interest of the investor.[97] For example, when a loan is not renewed or shares are sold, jobs on the ground can be lost, the national Gross Domestic Product may not grow at the same pace, a less sustainable investor may replace the previous one. In addition, the need to generate revenues is such that resources taken away from specific projects may be reinvested in equally problematic sectors (maybe less visible or away from public pressure). Equally, the decision to engage with a company instead of divesting may lead to the investors' capture and consequently being locked into situations where it is too costly for the company to improve its performances and the needed ESG investments are not realised because of the impact they may have on the expected return.

In the context of ESG, the decision to engage with finance and leverage its vocabulary and tools (accounting, ESG, materiality, reporting, etc.) generates an epistemological short circuit that cannot be simply solved by unilaterally implementing higher standards with the hope that they trickle down throughout the whole food chain or by preventing one project from happening. Moreover, and needless to

[94] CSR Europe and GRI (n 75).
[95] Timothy Cadman, 'Evaluating the governance of responsible investment institutions: an environmental and social perspective' (2011) 1(1) Journal of Sustainable Finance and Investment 20, 27.
[96] See, e.g., Lorraine Talbot (n 12); Charlotte Villiers (n 12).
[97] Dan Danielsen, 'Local Rules and a Global Economy: An Economic Policy Perspective', (2010) 1(1) *Transnational Legal Theory* 49; Tomaso Ferrando, 'Land Rights at the time of Global Production: Leveraging Multi-Spatiality and 'Legal Chokeholds' (2017) 2(2) *Business and Human Rights Journal* 275.

say, any measure undertaken within the paradigm of sustainable finance would be incapable of getting rid of finance itself. Thus, the tension and clashes between the industrial and global ideal world of BlackRock and the local and non-commodified framework of La Via Campesina (the largest peasants' organisation of the world) would thus not disappear. On the contrary, movements and organisations may end up legitimising the 'financial way of looking at the food system' and accept that nature, people, biodiversity, labour conditions, etc. have a price tag and can be expressed in terms of ROI. For those who believe in the incompatibility between the vision of the food system as an opportunity for rent-seeking and the food system as a complex construction of socio-ecological relationships that is essential both for people and nature, their concerns will not be addressed.

This should not come as a surprise but requires critical actors (including academics) to question whether the improvement of environmental and social performances of invested corporations justifies the rehabilitation of the financial system that was at the centre of the global meltdown of 2008 and the speculation on food commodities that skyrocketed the price of food all over the world. Is it truly possible to consider financial capital and financial actors as potential allies in the transition away from the global and unsustainable food system that they have contributed to and that they made their fortune from? Shall civil society, academics and activists put energy and time trying to nudge financial actors who currently "do not understand nor reward sustainable behaviour either because the markets are inefficient and do not reward good behaviour, or because market failure means that they do not need to worry about the very-long-term costs as they are outside of their investment time horizons?"[98] Is it worth translating the socio-environmental issues that characterised the food system in terms of externalities and accounting procedures, if this means financing improvements but also justifying the extraction of financial rent from it? The tensions are evident, and everyone interested in engaging with the EU Directive and the EU framework on sustainable finance should be aware of them and of the systemic implications of their decisions.

If we were optimistic, a solution may lie in between the complete rejection of sustainable finance and its full endorsement. Although hard to carve out, a new window of opportunity may have been opened by the mandatory nature of the disclosure introduced with the 2014 EU Directive, the application of the requirements to financial actors like pension funds and banks, the strengthening of the 'financial watchdog' role of civil society and the implementation by each Member State of robust and accessible mechanisms of monitoring and sanctioning. If actors were to combine these elements in a systemic strategy, they would leverage the transparency and visibility of the transnational financialised food system not to improve

[98] Steve Waygood, 'How do the capital markets undermine sustainable development? What can be done to correct this?' (2011) 1(1) *Journal of Sustainable Finance and Investment* 81, 83.

financial performances but to give visibility to the nexus of causality between financial capital and unsustainable food chains. Instead of legitimising finance and its vision of the world, a stronger understanding of the financial complexity of the food system would expose the role of finance and financialisation in defining the food system beyond commodity speculation. Furthermore, it may help mapping actors and responsibilities, so that concrete legal, political and campaigning interventions could be devised. The idea that ESG accounting and disclosure will automatically improve the global economy while making finance actors more resilient is imperfect and must be rethought and improved. Yet, if properly understood and leveraged, it opens new spaces for the political, legal, financial and cultural challenges of rent-seeking capitalism and the planned misery that permeates transnational food chains.[99]

[99] Susan Marks, *Root Causes*, (n 88).